In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 247

COLUMBUS AND GREENVILLE RAILWAY COMPANY,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case involves only a question of fact—the cost to petitioner of certain railroad properties purchased by it in 1923. The question was correctly resolved by the Tax Court (R. 35-66;[1] 42 T.C. 834). The court of appeals, holding that the Tax Court's finding was not clearly erroneous, affirmed *per curiam* (Pet. App. 1a; 358 F. 2d 294). There is no occasion for further review.

During the 1880's the Georgia Pacific Railway Co. constructed a railroad line from Atlanta, Georgia to the Mississippi River. In 1894 this railroad was acquired by the Southern Railway Co. and its wholly-

[1] "R." refers to the printed record in the court of appeals.

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owned subsidiary (Southern in Mississippi), with the latter owning that portion of the road within the State of Mississippi. Southern and its subsidiary purchased the property subject to $5,660,000 of mortgage bonds issued by Georgia Pacific in 1882. By May, 1923, Southern had redeemed all but $2,000 of the 1882 bonds.[2] Meanwhile, Southern's Mississippi subsidiary had gone into receivership, and in August, 1923, petitioner purchased Southern in Mississippi's property for $35,000 cash, subject to a $200,000 mortgage created by Southern in Mississippi and also subject to the 1882 mortgage bonds issued by Georgia Pacific. In 1926 Southern and petitioner agreed that petitioner was not obliged to bear any part of the cost of repaying the 1882 Georgia Pacific mortgage, and the bonds (virtually all of which had been redeemed before petitioner's acquisition of the Mississippi railroad property) were formally cancelled by the trustee.

The instant suit is concerned with petitioner's basis for depreciating the railroad properties which it purchased from Southern in Mississippi. The Code provides that petitioner's basis shall be its "cost of such property." Int. Rev. Code of 1939, § 113(a). Petitioner claims that its cost includes not only the $35,000 in cash which it paid and the $200,000 outstanding mortgage subject to which it acquired the property, but also an additional $2,038,335.80—*i.e.*, a proportionate part of the $5,660,000 1882 mortgage, none of which petitioner ever paid or was expected to pay. As both

[2] The bonds were not, however, cancelled at that time but were held by the trustee until 1926 as additional collateral for another mortgage created by Southern.

lower courts recognized, petitioner's claim is without merit.

Before petitioner acquired the property here in question, Southern had already paid all but $2,000 of the 1882 mortgage and was in the process of redeeming the remaining two outstanding bonds. Thus it was never anticipated that petitioner would pay any part of the 1882 mortgage.[3] Since the parties to the purchase transaction never intended either that petitioner would pay or that its properties would be liable for more than $235,000, its basis for the properties cannot exceed this figure. It is irrelevant that petitioner's vendor (Southern in Mississippi) or its vendor's parent (Southern) may have paid more for the property. A taxpayer who purchases property acquires a new basis for the property equal to his own cost, without regard to whether the property originally cost his vendor more or less.

Even if the parties had intended at the time of the conveyance that petitioner ultimately should reimburse Southern for some undetermined portion of the 1882 mortgage (R. 63), this intention would not affect petitioner's cost basis unless and until the amount of the contemplated payment became definite and certain. *Albany Car Wheel Co.* v. *Commissioner,* 333 F. 2d 653 (C.A. 2); *Allen* v. *Courts,* 127 F. 2d 127 (C.A. 5). Here it was eventually made explicit (in accordance

[3] Southern had carried the entire mortgage debt of $5,660,000 on its books as a liability and an addition to the cost of its properties (R. 44). Moreover, a few months before petitioner acquired the Mississippi properties (at which time virtually all of the bonds had been retired) Southern's president instructed its assistant secretary to cancel and destroy the bonds (R. 47).

with the probable original intention of the parties) that petitioner had no obligation to reimburse Southern for any portion of the 1882 mortgage (R. 49–50).

Contrary to petitioner's contention, the instant decision does not conflict with *Crane* v. *Commissioner*, 331 U.S. 1. In *Crane*, this Court held that the basis of property inherited by the taxpayer was its fair market value, undiminished by the amount of the mortgage encumbering it, and that the amount realized upon the sale of the property subject to the mortgage included the value of the mortgage, even though the taxpayer was not personally liable thereon. Unlike the taxpayer in *Crane*, petitioner's proceeds from a resale of the property would not have been reduced by the amount of the mortgage. Nor was petitioner to incur any additional cost in procuring a discharge of the mortgage; it was anticipated that the 1882 mortgage (only $2,000 of which was outstanding when petitioner purchased the assets here in question) would be discharged by Southern alone. Therefore, the lower courts' refusals to increase petitioner's "cost" basis because of expenses incurred, not by petitioner, but by its vendor's parent are fully consistent with this Court's *Crane* decision.[4]

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[4] To a large extent, petitioner's argument assumes the point it seeks to establish. For example, in discussing the cases on which it relies, petitioner states (Pet. 10): "The teaching of these cases is that *if the obligation* existed and *was a part of the cost of the property* at the time the petitioner obtained title to it, the fact that the obligation was extinguished, became unenforceable or settled for a lesser amount, did not affect the cost basis." [Emphasis supplied.] This argument overlooks the critical fact that, as the Tax Court found, the obligation involved here was *not* "part of the cost of the property."

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
MELVA M. GRANEY,
ROBERT A. BERNSTEIN,
Attorneys.

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